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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

Federal Communications Commission
Office of Secretary

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In the Matter of

Telecommunications Carriers' use of Customer Proprietary)
Network Information and Other Customer Information) CC Docket No 96-115
)

**COMMENTS OF THE
NATIONAL TELEPHONE COOPERATIVE ASSOCIATION**

National Telephone Cooperative Association ("NTCA") is a national association of approximately 500 local exchange carriers that provide service primarily in rural areas. All NTCA members are small carriers that are "rural telephone companies" as defined in the Telecommunications Act of 1996. Approximately half of NTCA's members are organized as cooperatives. NTCA submitted its own Petition for Reconsideration in the instant proceeding and submits these comments in response to other Petitions that were filed.

INTRODUCTION

As demonstrated by the sheer volume of Petitions filed, the telecommunications industry as a whole considers the new rules imposed by the Commission to be burdensome, unnecessary and a direct contradiction to the spirit and intent of Congress in enacting the Telecommunications Act of 1996,¹ specifically Section 222.

¹ Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996 Act) (codified at 47 U.S.C. §§ 151 *et seq.*).

DAE

NTCA agrees with those petitioners who argue that the FCC should reject its “Total Service Approach.” The rules as adopted by the Commission go too far in limiting the use of CPNI for the marketing of those services to which a customer does not already subscribe. The FCC also provides inadequate reasoning for not allowing CPNI use for the marketing of customer premises equipment and information services. Section 222(a) of the 1996 Act created a “duty to protect the confidentiality of proprietary information of, and relating to . . . customers.” Congress left it to the Commission to decide how to implement carriers’ CPNI obligations. However, any rules enacted must have been consistent with Congress’ intent to establish a “pro-competitive, deregulatory national policy framework.” As several petitioners point out, the CPNI rules are far from consistent with the pro-competitive, deregulatory policy.² The Commission should examine its rules with Congressional intent in mind.

While NTCA agrees with Petitioners that the FCC should reconsider its rules involving CPNI use restrictions, the bulk of its arguments is laid out in its own Petition for Reconsideration. NTCA therefore uses the rest of this comment to discuss Petitions involving the complex auditing and tracking requirements imposed by the FCC.

Every party who commented on the FCC’s so-called “safe guards” says that the FCC grossly underestimated the costs associated with the software requirements.³ Cost estimates

² See, e.g. Petition of TDS Telecommunications Corporation, p. 3; Petition of AT&T, p. 2; Petition of BellSouth, p. 2.

³ See, e.g. , Petitions of TDS Telecommunications Corporation, MCI Telecommunications Corporation, LCI International Telecom Corp., Bell Atlantic, AT&T, BellSouth, The Independent Alliance, Sprint Corporation.

range from \$630,000⁴ to \$270 million.⁵ NTCA believes that based on the Petitions received, the FCC should abandon its auditing and tracking requirements and let the licensees determine the best way to comply with the CPNI use restrictions.

However, even if the FCC does decide to move forward and require licensees to implement the auditing and tracking software, it should forbear from doing so against the rural telecommunications carriers ("rural telcos").

Forbearance is not only appropriate, but is required if the Commission determines that:

- (1) enforcement is not necessary to ensure that the charges, practices, classifications, or regulations . . . are reasonable and are not unjustly or unreasonably discriminatory;
- (2) enforcement of such regulation or provision is not necessary for the protection of consumers; and
- (3) forbearance from applying such provision or regulation is consistent with the public interest.⁶

As is demonstrated below, forbearance from applying the auditing and tracking requirements to rural telcos is the appropriate course of action.

Enforcement of the CPNI Auditing and Tracking Requirements is not Necessary to Ensure that the Practices of Rural Telcos are Reasonable, nor is it Necessary to Protect Consumers

The Commission imposes very complex audit mechanisms to discourage unauthorized perusal of customer accounts.⁷ However, as Sprint Corporation and BellSouth point out, the

⁴ Petition of TDS Telecommunications Corporation.

⁵ Petition of AT&T.

⁶ 1996 Act, Sec. 10.

⁷ Implementation of the Telecommunications Act of 1996: Telecommunications Carriers' Use of Customer Proprietary information and Other Customer Information, Second

Commission does not cite to any record evidence demonstrating that “unauthorized casual perusal of customer accounts” is a significant problem.⁸ It only makes sense that the Commission should define a problem and determine that a solution is necessary before imposing complicated and costly new software requirements.

The electronic audit trail requirement is unnecessary given the fact that other existing compliance mechanisms required by the CPNI Order are sufficient, and far more efficient and practical for rural telcos. Rural telcos are, by their very nature, small. Some have fewer than fifteen employees. Managers of such companies rely primarily and successfully on employee training and supervision to ensure compliance with all Commission rules. There is no evidence to suggest that such training and supervision would not provide the Commission with its desired result regarding CPNI use restrictions. NTCA, like the Independent Alliance is not seeking forbearance from the substantive requirements of Section 222.⁹ NTCA recognizes that the customers of its member companies have privacy interests which deserve protection. However, that privacy may be protected, in full compliance with the Commission’s rules, through far less costly and burdensome methods. The Congressional privacy goals may be achieved by rural telcos through company imposed personnel training, supervisory review and company certification.

Report and Order, FCC 98-27 (released February 26, 1998 at 199). (“CPNI Order”)

⁸ Petition of Sprint Corporation at p. 4, Petition of BellSouth at p. 23.

⁹ See, Petition of the Independent Alliance at p. 5.

Forbearance is In the Public Interest

Every Petitioner which addresses the point agrees that implementing the Commission's auditing requirements will be expensive. TDS estimates it will cost \$630,000, whereas AT&T estimates upwards of \$200 million. NTCA's own estimates were a couple hundred thousand dollars per company (for those companies already mechanized), plus personnel and employee training. The truth is that even a couple of hundred thousand dollars is a huge financial burden to rural telcos. There is simply no way to spread the cost when the customer base consists of just a few hundred subscribers.

The FCC declined to limit its software requirements to large carriers based on erroneous information and conclusions. The Commission relied on statements by large carriers to declare that the new requirements "represent minimum guidelines that most carriers can readily implement and that are not overly burdensome." However, several rural telcos do not have the mechanized systems necessary to begin considering an upgrade. Entire systems will have to be purchased, overhauled or replaced. This cost, potentially millions of dollars for the independent segment of the industry alone, will eventually be borne by the customer. The public interest is served by avoiding this unnecessary cost.

The FCC suggests that the new rules will not be overly burdensome because truly burdened companies may request a waiver. However, the 1996 Act **requires** regulatory forbearance where the public interest is served thereby. Waiver requests are expensive. Certain legal and factual arguments are necessary for a waiver request to be successful. Since companies typically recognize the importance and complexity of such a request, they employ a lawyer to

prepare and file it. Assume that a Washington, DC associate, working at a small firm, bills out at \$150.00 an hour. This associate speaks with the client, gathers the facts and drafts the request in just a day and a half. The partner reviews the associate's work in one hour at \$250.00 an hour and the draft is almost perfect, requiring only minor revisions. The associate spends another hour and a half making revisions and then the waiver request is sent to the client for signature. The client signs it, sends it back to the law firm, where the waiver request is copied, collated and couriered to the FCC. This little waiver request has now cost the rural telco \$2,175.00 plus copying and couriating fees. Legal costs are likely to be much higher for small telcos that have no existing relationship with FCC counsel. NTCA's 500 member rural telcos will spend more than a million dollars just in lawyers' fees. For the FCC to require such an expense, eventually to be borne by the consumer, is unjustifiable given the fact that every rural telco will qualify for a waiver. Despite the FCC's reluctance to grant regulatory forbearance, it is difficult to imagine a situation which demands it more.

It has not been shown that the proposed auditing and tracking rules will be effective in protecting privacy or promoting competition. It is also apparent that the rules will be difficult to enforce fairly. The public interest is not served by rules that confuse and fail to accomplish stated goals.

The FCC not only has the option of granting regulatory forbearance in this instance, it is **required** to do so. The public interest demands it.

The FCC's Auditing Rules do not Comply with the Regulatory Flexibility Act

As the Competitive Telecommunications Association points out in its Petition for Reconsideration, the FCC gave no warning that it would impose such complex "safeguard" requirements. Carriers were not given adequate notice of the systems modifications that were announced in the CPNI Order.

In its *Notice of Proposed Rulemaking*,¹⁰ The FCC "tentatively concluded that [it] should not now specify [computer system] safeguard requirements for all . . . telecommunications carriers." Thus, in the NPRM, the FCC had tentatively concluded that the rural telcos would not have to upgrade their systems to implement the safeguard requirements. No comment was sought on safeguard regulation for small telcos. The Commission never even proposed the complex regulations that were adopted. The tentative conclusion of the NPRM was in keeping with the spirit of the 1996 Act, and misled carriers to believe that they would not be subject to new safeguard regulation.

In the CPNI Order, the Commission reversed the NPRM's tentative conclusion, and required complex safeguard implementation of all carriers. This final decision did not rely on comments received from the public during the normal comment period. The FCC instead based its conclusions on information received during five *ex parte* presentations made outside of its filing schedule. Those *ex parte* comments provided the only foundation for the rules. The rural

¹⁰ *In the Matter of Implementation of the Telecommunications Act of 1996: Telecommunications Carriers' use of Customer Proprietary Network Information and Other Customer Information*, Notice of Proposed Rulemaking, CC Docket No. 96-115, 11 FCC Rcd 12513 (1996).

telcos were never even made aware of what the FCC was considering and never had the opportunity to comment on it. The FCC implemented its rules without a full record of their impact.

The Regulatory Flexibility Act of 1980¹¹ requires the Commission to solicit and consider flexible regulatory proposals to minimize the significant impact of the rules on small entities without conflicting with the objectives of proposed regulations.¹² The 1995 Small Business Enforcement Fairness Act of 1996¹³ strengthened the position of small businesses by requiring a more detailed and substantive regulatory flexibility analysis. Section 603(b) requires the Commission in its NPRM to describe the projected reporting, record keeping and other compliance requirements of the proposed rule. In its NPRM, the Commission describes its reporting, record keeping and other compliance requirements as “None.”¹⁴ “None” is certainly not what was adopted. The Commission is also required to contain a description of any significant alternatives to the proposed rule which will accomplish the stated objectives and which minimize any significant economic impact of the proposed rule on small entities. The

¹¹ 5 U.S.C. § 601

¹² There has been some confusion over whether or not incumbent local exchange carriers (“ILECs”) are “small businesses” for purposes of the Regulatory Flexibility Act. The FCC claims to have considered small ILECs within the Regulatory Flexibility Analysis of the CPNI Order “out of an abundance of caution.” CPNI Order at para. 215. This caution is meaningless since small ILEC alternatives were not considered.

¹³ Small Business Enforcement Fairness Act of 1996, Pub. L. No. 104-121, 110 Stat. 857 (codified at 5 U.S.C. § 601 et seq. (1996)).

¹⁴ *In the Matter of Implementation of the Telecommunications Act of 1996: Telecommunications Carriers’ use of Customer Proprietary Network Information and Other Customer Information*, Notice of Proposed Rulemaking, CC Docket No. 96-115, 11 FCC Rcd 12513 (1996).

Commission purports to request comments on alternatives in its NPRM, but since the FCC never even proposed the "safeguard" rules, small carriers had absolutely no warning that the rules that were adopted were even being considered by the Commission. Alternate proposals were not solicited. Alternative proposals were not submitted. The Commission must reconsider the rules, based on a complete record.

Conclusion

NTCA respectfully agrees with the 26 Petitioners who argue that the CPNI use rules should be reconsidered.

Respectfully submitted,

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June 25, 1998

CERTIFICATE OF SERVICE

I, Gail C. Malloy, certify that a copy of the foregoing Comments of the National Telephone Cooperative Association in CC Docket No. 96-115 was served on this 25th day of June 1998, by first-class, U.S. Mail, postage prepaid, to the following persons on the attached list:


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